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No. 99-501

Supreme Court, U.S.
FILED
DEC - 6 1999
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999

DETROIT AUTO AUCTION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR PETITIONER IN REPLY

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ARGUMENT

This case is about promises of new benefits to employees during the critical period prior to a union representation election. This case is not about election campaign propaganda addressing the natural concerns of employees or campaign statements about existing benefits.

In NLRB v. Savair Manufacturing Co., 414 U.S. 270 (1973), this Court rejected the National Labor Relations Board's (hereinafter referred to as the "Board") conclusion that employees were not coerced when a union promised that it would not charge an initiation fee to those employees who signed recognition slips.[1] In this Court's view, "the

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[1] The Board will not hold an election on a petition if the petition is not supported by at least 30% of the employees in the petitioned-for bargaining unit. National Labor Relations Board's Rules and Regulations, Sec. 101.13. The necessary support is typically evidenced by "authorization" cards (referred to as "recognition slips" in Savair) signed by employees in which they authorize the union to act as their exclusive collective

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Board's analysis ignore[d] the realities of the situation." Savair, 414 U.S. at 277. This Court explained that "an employee who signs a recognition slip prior to an election is indicating to other workers that he supports the union. . . . By permitting the union to offer to waive an initiation fee for those employees signing a recognition slip prior to the election, the Board allows the union to buy endorsements and paint a false portrait of employee support during its election campaign." Savair, 414 U.S. at 277.

The Board in the present case also ignored "the realities of the situation." The Union's promises here were even more egregious than in Savair because the promises were conveyed during the critical period just prior to the representation election. Therefore, the promises effectively allowed the Union to buy votes, not simply authorization cards or endorsements "to paint a false portrait of employee support."

The Union promised strike-related benefits to, as the Government admits, *alleviate* employee concern over strikes

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(...continued)
bargaining representative.

(Gov. Br. 8). Because of the Union's promises, the consequences of a possible strike were no longer a concern for employees. The Union promised employees that, in the event of a strike, they could honor the picket line and receive $150.00 each week in compensation from the Union (whether or not the employees ever paid dues to the Union) or cross the picket line with the Union's permission, continue to receive a paycheck from the employer and suffer no retribution (e.g., fines, intimidation). Lastly, the Union promised to make a strike a less likely event by raising the voting standard for a strike to a "super" majority, 2/3 of all the employees in the bargaining unit. These promises were made against the backdrop of the violent strike at the Detroit Newspapers, which was well known in the Detroit area where Petitioner is located. See generally, NLRB v. Detroit Newspapers, 185 F.3d 602, 604 (6th Cir. 1999). The Board was required to apply the objective, tendency-to-influence standard and find that the promises interfered with employee free choice.

The Government, however, cites Savair and contends that the promises were not vote-buying promises because the promised-for benefits were extended to all employees, not just those who supported the Union. Obviously, the

employees would understand that the strike benefits were implicitly conditioned on a vote for the Union. These benefits would only be available to employees if the Union won the election. The fact that the Union's promises were not expressly conditioned on a vote for the Union does not mean that the promises did not have a vote-buying affect. If this were true, an employer could promise all employees—not just those who vote against a union—a 50¢ per hour pay increase. This Court explained in Savair that although the benefits conferred by an employer in its Exchange Parts decision were unconditional, the "employees were 'not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.'" Savair, 414 U.S. at 280, *quoting* NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964).

Similarly, the unconditional promise of strike-related benefits made by the Union would also have a coercive affect upon the electorate. The promises would reasonably tend to cause employees to vote for the Union because the possibility of a strike would no longer pose a hardship to them. Also, nonunionists may have cast their votes for the Union fearing that, if the Union

won the election, the Union could renege on its promise if a strike occurred. *See* Savair, 414 U.S. at 281 ("the failure to sign a recognition slip may well seem ominous to nonunionists who fear that if they do not sign they will face a wrathful union regime, should the union win").

The Government's *quid pro quo* argument is also contrary to the Board's own decision in Alyeska Pipeline Service Co., 261 NLRB 125 (1982). In Alyeska, the Board found that a union interfered with employee free choice when it promised that union membership would mean favorable priority position to secure job opportunities. The Board found the statements to be coercive because the union had the power to effectuate the promise, in contrast to those nonviolative promises that can only be achieved through collective bargaining. Alyeska Pipeline Service Co., 261 NLRB at 127 n.4. The dispositive factor was that the union in Alyeska, like the Union here, had the power to effectuate the promise, thereby suggesting "a fist inside the velvet glove." Alyeska Pipeline Service Co., 261 NLRB at 127.

Citing Dart Container, 277 NLRB 1369 (1985), the Government argues that employee free choice was not interfered

with simply because the Union's promises addressed a *natural employee concern* (Gov. Br. 3). This argument is illogical and unsupported by Dart Container. If the amount of employee concern over the promised-for benefit was the yardstick by which promises were measured, employers would be permitted to promise workers all kinds of benefits, e.g., wage increases, more paid time off, free health insurance during the term of their employment. But it is not lawful for an employer to make such a promise during the pre-election period. Nor is it lawful for a union to make such a promise on a matter that is within its exclusive control. Alyeska Pipeline Service Co., 261 NLRB 125 (1982). As the Government admits in its brief (Gov. Br. 5), the Board has long applied an objective, tendency-to-influence standard in evaluating whether certain campaign tactics interfere with employee free choice.

Dart Container does not stand for the proposition that a promise is excused so long as it addresses a natural employee concern. Rather, the Board found that the promises in that case did not interfere with the election because the union simply pointed out *existing* benefits enjoyed by its members. Dart Container, 277 NLRB at 1370. The Board explained that "[j]ust as an employer can

call attention to benefits that its employees in the proposed unit currently enjoy, so, too, can a union point out the benefits its members currently enjoy." Dart Container, 277 NLRB at 1370. Here, however, the Union's promises were not about *existing* benefits, but rather new benefits. Therefore, The Board was required to apply its objective, tendency-to-influence test to the Union's promises.

But the Government characterizes the promises as campaign propaganda and maintains that the tendency-to-influence standard is not applicable to the Union's promises (Gov. Br. 5). In doing so, it ignores this Court's landmark Gissel Packing decision. Over thirty years ago, this Court stated that the right to free speech under the First Amendment does not extend to promises. NLRB v. Gissel Packing Co., 395 U.S. 575, 617-618 (1969).

Not only does the Government ignore Gissel Packing, it contends, without any legal authority whatsoever, that four "considerations" support the Board's determination that the Union's promises constituted "permissible campaign speech" (Gov. Br. 5-6). Initially, the Government argues that the promises were excusable campaign propaganda because *the Union*

made the promises. But unions, like employers, are prohibited from making pre-election promises. Mailing Services, Inc., 293 NLRB 565, 566 n. 3 (1989). Secondly, the Government argues that the promises became campaign propaganda after the Petitioner told the electorate that the Union had broken promises in the past. Any response by the Petitioner to the Union's promises cannot logically change the original, coercive character of the Union's promises. *See* Alyeska Pipeline Service Co., 261 NLRB 125 (1982). Thirdly, the Government contends the promises were benign because the promises "addressed matters of natural concern to employees" (Gov. Br. 6). There is no safe harbor in labor law jurisprudence for promises that respond to the *natural concerns* of employees. If anything, promises on employee concerns, as opposed to promises on irrelevant matters, would logically be the most coercive. Fourthly, contrary to the Government's argument, the Union's promises are not judged by the presence or absence of an express *quid pro quo* (strike benefits in exchange for a vote for the Union). Rather, promises are evaluated by the Board's objective, tendency-to-influence test. Under this standard, the Union's promises had a reasonable tendency to coerce employees.

CONCLUSION

This case warrants review because the Union's promises present an extension of Savair. The Union's promises were made prior to an election and not during the pre-petition phase which this Court found unlawful in Savair. Granting the petition for writ of certiorari would afford this Court an opportunity to offer guidance on the subject of union promises, a subject it has not addressed since 1973 in Savair.

Respectfully submitted,

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December 3, 1999